

**Welcome to the City of Mesa Electric Smart Peaks Program (“Program”).** By becoming a Participant of the Program, you may reduce stress on the grid in your electricity service area. By participating in the Program, you may be eligible to receive the Incentive described below, subject to these Terms and Conditions (“**Terms**”). To become a Participant in the Program, you must submit an application to, and have it accepted by, Program Host and the Utility (as each is defined below).

YOU MUST BE AN EXISTING USER OF THE VENDOR INTERNET CONNECTED THERMOSTAT (“**SERVICE**”) TO BECOME A PARTICIPANT. PLEASE READ THESE TERMS CAREFULLY. THIS PROGRAM IS VOID WHERE PROHIBITED BY LAW.

**Binding Agreement.** By applying for the Program, you agree to comply with and be bound by these Terms, even if your application is not accepted or approved by the Program Host and the Utility. Failure to comply with these Terms may result in your disqualification from the Program. The decisions of the Program Host and the Utility regarding your eligibility to participate are final and binding in all respects. Program Host reserves the right in its sole discretion to disqualify any Participant for, among other things: (1) tampering or attempting to tamper with the operation of the Program; or (2) violating these Terms or the terms and conditions of use of any of Utility Side Parties’ property or service or (3) terminating enrollment in the Program prior to the end of the Peak Season. **Any false information provided within the context of the Program by any Participant is a violation of these Terms and may result in the immediate disqualification of a Participant in addition to forfeiture and/or revocation of any Incentive through Participant’s utility bill or by any other means available to Utility.**

**Definitions.** In the context of these Terms,

- **“Device”** means a device that can be monitored and controlled during the Program through the Vendor cloud platform or other communications pathway.
- **“Peak Season”** means the period of time from June 1 through September 30, inclusive.
- **“Program Host”** Program Host is the company, specifically Virtual Peaker Inc., responsible for providing Services to which the eligible devices will be connected. Program Host’s platform allows the Utility to run Conservation Events.
- **“Service”** means Vendor’s cloud platform.
- **“Utility”** means your utility, namely City of Mesa.
- **“Utility Side Parties”** means Program Host, Vendor, and Utility, their respective successors and assigns, and each of their respective affiliates, agents, directors, officers, and employees.
- **“Vendor”** means the eligible third-party manufacturer or provider of the Participant’s thermostat.

**About the Program.** Applicants whose applications to participate in the Program are accepted by Program Host and Utility (“**Participants**”) and who fully comply with these Terms may receive the incentives set forth below (“**Incentive**”) to be provided to you by Utility. To receive the Incentive, you must be accepted as a Participant by the Program Host and Utility and your participation must not be withdrawn or terminated.

**Program Description.** Participant agrees to allow Utility Side Parties (utilizing Program Host’s platform and Vendor’s Service) to control the Participant’s Devices during the Program Period. Such adjustments are referred to as “**Conservation Events**.” Conservation Events may change device mode, setpoint, or other settings, as applicable. For Devices that allow for temperature control, Conservation Events may include or be preceded by “pre-cool”, wherein the then-current or scheduled target temperature setpoint is temporarily changed to prepare for the subsequent adjustment. For certain types of services offered by the Utility Side Parties, a Conservation Event may occur even if the Device is in any kind of hold mode at the start of the Conservation Event. Participant may opt out of any Conservation Event at any time directly by adjusting their device.

**Application Consent by Participant.** By submitting an application to enroll as a Participant, you authorize the Utility Side Parties to 1) collect and exchange data related to your identity, your opt-in or opt-out status, your energy usage and/or energy production, your Utility account, your electric bill, and your Devices (collectively, “**Program Data**”), for the purposes of determining your

eligibility for the Program and operating the Program; 2) review and analyze all of your Program Data for the purposes of the Utility Side Parties fulfilling their obligations under the Program and applicable law, improving the Program and as otherwise permitted by applicable law, and to exchange conclusions with each other and publish results based on those conclusions, provided that they treat all such Program Data in accordance with their respective privacy policies (which are linked below under the "Privacy Notice"; 3) automatically adjust your Devices, as required by the Utility, at its sole discretion, or for general system testing purposes; 4) send you emails, text messages, pre-recorded messages and other notifications related to the Program, or other similar programs, including about your enrollment status and Program-related adjustments to your Devices; 5) send you emails, text messages, pre-recorded messages and other notifications related to surveys about the Program and to share your responses to such surveys among themselves; and 6) summarize the results of the Program in publicly-available studies, provided that any Program Data included in such studies will be anonymous such that you are not individually identifiable.

**Eligibility and Enrollment.** You may apply to become a Participant and participate in the Program if you meet the following eligibility criteria and do the following:

- o You are a business entity or individual (in which case, you must be at least 18 years of age);
- o You must have one or more Devices that are compatible with and connected to the Service and compatible with the Program design;
- o You maintain an active residential account in good standing with the Utility
- o You maintain an active account in good standing on the Service and a continuous connection between your enrolled Devices and the Service; and
- o You are willing to maintain, repair, and replace the Device so that it is in working condition subject to the terms of this agreement; and
- o You assist Utility Side Parties' support personnel in troubleshooting and resolving connectivity, firmware and other Device-related issues.

**Program Period.** The Program will run continuously until terminated by a Utility Side Party or by customer withdrawal. Utility retains the right to terminate the Program at any time.

**How To Apply.** You can apply to participate in the Program through the Vendor's Device application in conjunction with Program Host's web site, both of which may be updated from time to time. Program Host and Utility may accept or reject your application, each in their sole discretion.

**How To Withdraw.** Once you are accepted as a Participant in the Program, you may withdraw by emailing the Utility contact address specified below or by withdrawing through your Vendor's withdrawal process, as applicable. Withdrawal will not affect the other services provided by the Utility Side Parties to you. By withdrawing, you may render yourself ineligible to receive the participation Incentive, participate in the Program in the future, or participate in other programs offered by Program Host.

**Program Termination.** Program Host's ability to offer the Program is contingent on receiving certain approvals and acceptances from Utility. If such approvals and acceptances are withheld or withdrawn, or if the Program is declared unlawful, the Program will be terminated along with the Incentive. In the event of such termination, Program Host will provide notice at [www.virtual-peaker.com](http://www.virtual-peaker.com).

**Disqualification.** Program Host may terminate your participation in the Program and Incentive at any time and without liability upon notice to you via email if you violate these Terms or applicable law, if you do not comply with any reasonable request from a Utility Side Party in connection with this Program, if Utility declares you ineligible for the Program, if your account with Program Host is no longer in good standing, or if you do not maintain a continuous connection between your

enrolled Device(s) and the Service (outside of normal communication service interruptions). If you enroll in a conflicting energy program through Utility Side Parties, Program Host may terminate your participation in the Program without liability.

**Privacy Notice.** By participating in the Program, you agree that the Utility Side Parties may collect your personal information or data and that if they cannot collect the required information or data, you may not be eligible to participate in the Program. Utility Side Parties will protect your personal information and usage data consistent with these Terms and each company's then-current privacy policy.

**Changes in Your Electricity Costs.** Utility Side Parties are not responsible for any changes in your electricity costs during the Program.

**Information.** You represent and warrant to Program Host that the information you provide to Program Host while applying for and during the course of the Program is accurate and complete, and you agree to promptly notify Program Host if any information you provided during your application for the Program has changed.

**General Conditions.** This Program is governed by the laws of the State of Arizona without regard to its applicable principles of conflicts of law. The Program Host's failure to enforce any term of these Terms shall not constitute a waiver of that provision. THE UTILITY SIDE PARTIES ARE NOT RESPONSIBLE OR LIABLE FOR ANY INCORRECT OR INACCURATE PROGRAM APPLICATION INFORMATION, AND ASSUME NO RESPONSIBILITY FOR (I) TYPOGRAPHICAL OR OTHER ERRORS IN THE PRINTING OF THE PROGRAM MATERIALS OR THE OFFERING OR ANNOUNCEMENT OF ANY INCENTIVE, (II) ANY ERROR, OMISSION, INTERRUPTION, DEFECT OR DELAY IN OPERATION OR TRANSMISSION AT ANY WEBSITE, (III) FAILURE OF ANY APPLICATION TO BE RECEIVED BY PROGRAM HOST DUE TO TECHNICAL PROBLEMS, TELEPHONE SERVICE PROBLEMS, PRINTING ERRORS, HUMAN ERROR OR TRAFFIC CONGESTION ON THE INTERNET OR AT ANY WEBSITE, (IV) COMMUNICATIONS LINE, HARDWARE AND/OR SOFTWARE FAILURES, (V) DAMAGE TO ANY COMPUTER OR DEVICE (SOFTWARE OR HARDWARE) RESULTING FROM PARTICIPATION IN THE PROGRAM, (VI) THEFT OR DESTRUCTION OF, TAMPERING WITH, UNAUTHORIZED ACCESS TO, OR ALTERATION OF APPLICATIONS AND/OR PROGRAM APPLICATION INFORMATION, (VII) APPLICATIONS WHICH ARE LATE OR LOST, OR (VIII) ANY LOSS OF INCOME OR OTHER CONSEQUENTIAL DAMAGES DUE TO DEVICE CONTROL. PARTICIPANT ASSUMES ALL RISK OF PARTICIPATION IN THE PROGRAM. TO THE MAXIMUM EXTENT PERMITTED BY LAW, YOU INDEMNIFY AND AGREE TO KEEP THE UTILITY SIDE PARTIES INDEMNIFIED AT ALL TIMES FROM AND AGAINST ANY LIABILITY, CLAIMS, DEMANDS, LOSSES, DAMAGES, COSTS AND EXPENSES THAT ARISE FROM OR ARE RELATED TO ANY ACT, DEFAULT OR OMISSION BY YOU AND/OR A BREACH OF ANY WARRANTY BY YOU AND/OR TO ANY ACT, DEFAULT OR OMISSION BY YOU UNDER THESE TERMS. TO THE MAXIMUM EXTENT PERMITTED BY LAW, YOU AGREE TO HOLD THE UTILITY SIDE PARTIES HARMLESS FROM ANY INJURY OR DAMAGE, WHETHER DIRECT, INDIRECT, SPECIAL, OR CONSEQUENTIAL CAUSED OR CLAIMED TO BE CAUSED BY PARTICIPATION IN THE PROGRAM AND/OR USE OR ACCEPTANCE OF ANY INCENTIVE OTHER THAN FOR: (1) DEATH OR PERSONAL INJURY ARISING AS A RESULT OF PROGRAM HOST'S DIRECT, ACTIVE NEGLIGENCE; OR (2) THE UTILITY SIDE PARTIES' FRAUDULENT MISREPRESENTATION. THE PROGRAM HOST PARTIES HAVE NO LIABILITY TO ANY PARTICIPANT FOR ANY LOSS, DAMAGE, COSTS OR EXPENSE INCURRED AS A RESULT OF OR IN CONNECTION WITH A PARTICIPANT'S PARTICIPATION IN THE PROGRAM.

If any provision of these Terms is held to be invalid or unenforceable, all remaining provisions of these Terms will remain in full force and effect. These Terms will be binding on Program Host and its successors and assigns, and Participant. Participant may not assign these Terms without the written consent of Program Host whereas Program Host may assign these Terms to any third

party. The Utility Side Parties are not responsible for the policies, actions, or inactions of others that might prevent the Participant from entering, participating, or claiming an Incentive.

These Terms constitute the entire agreement between Program Host and a Participant relating to the subject matter hereof and supersede all other such prior or contemporaneous oral and written agreements and understandings.

**Arbitration.** If you and the Program Host do not resolve any dispute by informal negotiation, any other effort to resolve the dispute will be conducted exclusively by binding individual arbitration governed by the Federal Arbitration Act ("FAA"). You are giving up the right to litigate (or participate in as a party or class member) all disputes in court before a judge or jury. Instead, all disputes will be resolved on an individual basis before a neutral arbitrator, whose decision will be final except for a limited right of appeal under the FAA. Any court with jurisdiction over the parties may enforce the arbitrator's award.

**No Class Action Procedure.** Notwithstanding any of the foregoing or any other provision of these Terms, class arbitration is not permitted under any circumstance. You and the Program Host agree that, by entering into these Terms, THE PARTIES MAY BRING CLAIMS AGAINST THE OTHER ONLY IN THEIR RESPECTIVE INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding. Although the non-availability of any form of representative or class proceeding is clear from these Terms, should any dispute arise regarding or relating to the existence, validity, enforceability, or interpretation of the Arbitration and No Class Action Procedure provisions above, the federal court located in Maricopa County, Arizona shall have the sole and exclusive jurisdiction to hear and determine the issue.

**Changes to the Terms.** Program Host may modify these Terms at any time. Program Host will notify you by email at the most current email address Program Host has on record for you when Program Host makes any material changes to these Terms, and the effective date of the modified Terms, which will be after the date of Program Host's notice to you. Your continued participation in the Program thereafter signifies your acceptance to such modified Terms. The modified Terms will apply only to disputes that arise after the effective date of such modified Terms. Program Host will also post the most current version of the Terms on its website specified below and encourages you to check this site frequently.

**Acceptance of Agreement.** The use of an electronic signature process to accept and sign these Terms, including your indication of acceptance of these Terms by a click-through or click-wrap process presented on Program Host's website, shall constitute effective execution and delivery of these Terms, and shall form a binding contract between you and the Program Host.

#### **Additional Program Details.**

- Utility's Program website: [www.mesaaz.gov/residents/energy/electric/electric-smart-peaks-program](http://www.mesaaz.gov/residents/energy/electric/electric-smart-peaks-program)
- Incentive amount: Enrollment incentive of \$50/device paid one-time upon enrollment for each customer Premise during the Peak Season. Participants will earn the enrollment incentive in their first year of participation so long as they submit a complete application by September 1<sup>st</sup>.
- Utility contact information: 480-644-2151 and [DSWBilling@mesaaz.gov](mailto:DSWBilling@mesaaz.gov)
- Electric utility service is subject to Utility's Terms and Conditions of Service for the Sale of Utilities which can be found in Utility's Utility Rate Book at <https://www.mesaaz.gov/government/office-of-management-budget/utility-rates/>